BISI JINGGOT

v.

SUPERINTENDENT OF LANDS AND SURVEY KUCHING DIVISION & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[SUIT NO: 22-11-2002-II]
30 APRIL 2008

NATIVE LAW AND CUSTOM: *Land dispute - Native customary rights - Whether transferable via sale and purchase agreements - Whether strict compliance of customary formalities necessary*

The plaintiff claimed that he acquired native customary rights ('NCR') over three different areas and categories of lands in Sarawak. The main issue was whether the plaintiff was entitled to acquire the NCR over some parcels of lands pursuant to sale and purchase agreements.

Held (dismissing the plaintiff's claim):

(1) The plaintiff did not allege that his ancestors were in continuous occupation of the lands concerned. He claimed that he had purchased the NCR by way of sale and purchase agreements. The NCR could not be transferred *via* a modern instrument of transfer. The NCR could only be transferred in a limited sense by way of gift, inheritance, etc. within the community members of the native before any claimant could be given exclusive privileges. (para 15)

(2) A native from a community residing in the south of Sarawak cannot purchase the NCR from a community residing in the north of Sarawak. The nexus must be within the community itself and not within the race. For courts to recognise any such transfers it must be legislated. In the present case, it was not sufficient for the plaintiff to allege such transfers were in vogue and were recognised in practice without satisfactory evidence adduced in court. The burden of proof was with the plaintiff who failed to discharge it according to law. (para 15)

A **(3)** The plaintiff did not acquire NCR pursuant to the Sarawak Land Code. NCR in accordance with the Iban customary laws could only be acquired in the manner set out in s. 5 of the said Land Code or such rights over land must be recognised according to laws in force prior to 1 January 1958. Further, B the NCR is not a right in rem. The law requires strict adherence to NCR. The transfer of NCR must take place according to strict compliance of customary formalities. (paras 6 & 15)

C **Case(s) referred to:**
Galau & Ors v. Penghulu Imang & Ors [1966] 1 LNS 50 ***(refd)***
Madeli Salleh v. Superintendent of Lands & Surveys & Anor [2005] 3 CLJ 697 CA ***(refd)***
Ongkong Ak Salleh v. David Panggau Sandin & Anor [1982] 1 LNS 92 ***(refd)***
D *Sat Ak Akum & Anor v. Randong Ak Charareng [1958] SCR 104* ***(refd)***
Sumbang Ak Sekam v. Eangkarong Ak Ajah [1958] SCR 95 ***(refd)***
Superintendent of Land Surveys Miri Divison & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

E **Legislation referred to:**
Courts of Judicature Act 1964, s. 23(1)(d)
Evidence Act 1950, s. 101
Federal Constitution, art. 75
Native Court Ordinance, s. 5(3)(a)
Public Authorities Protection Act 1948, s. 2
F Sarawak Land Code 1958, ss. 5(1), (2), (7), 10(3), 12, 19(1), 202, 213

For the plaintiff - Baru Bian; M/s Baru Bian Advocates
For the 1st & 2nd defendants - Saferi Ali, State Legal Officer; State Attorney-General's Chambers
G *For the 3rd defendant - Abang Halit Abang Malik; M/s Loke, King, Goh & Partners Advocates*
For the 4th defendant - Yen Tze-Ee; M/s Ee & Lim Advocates

Reported by Usha Thiagarajah

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JUDGMENT

Hamid Sultan Abu Backer JC:

I **[1]** This is my judgment in respect of the plaintiff's claim for declaration and various other reliefs on the premise of Native Customary Rights (NCR).

Preliminaries

[2] At the commencement of the action, parties have agreed that the case can be heard by way of: (i) witness statement for examination in chief; (ii) preliminary cross-examination by witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is further oral examination. The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination of witness statement will save much of the court's time to deal with peripheral matters and for all practical purpose, preliminary cross-examination of witness statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

[3] The central issue in this case after hearing the arguments of both parties primarily involves the issue whether a native is entitled to maintain NCR pursuant to a transfer under a modern sale and purchase agreement as opposed to customary transfers (if any).

[4] A total of 12 witnesses gave evidence for the plaintiff and the defendants. There was no dispute in respect of the status of the plaintiff as a native, who in this case, is an Iban and/or Sea Dayak by race, and therefore a native of Sarawak.

Brief Facts

[5] The plaintiff says: (i) he has acquired and/or inherited and/or created NCR over three different areas and category of lands. The first being eight (8) parcels of Native Customary Land (NCL) totalling approximately 37.24 acres at Sungei Agas, 13th Mile, Matang, Matang Land District, Kuching, Sarawak, (collectively referred to as the said "1st parcel of land") by virtue of eight sale and purchase agreements, (ii) the second area or category of land claimed by the plaintiff is known as lot 34 as marked and shaded green in the map annexed to the statement of claim. The plaintiff claims prior right as against the 4th defendant over the said 2nd plot of land as it was he who first cultivated the said 2nd plot of land in 1986 for cocoa scheme and thereafter for his SEDC Adoption Scheme for cattle farming in 1991. The said lot 34 is approximately 2.94 acres, (iii) the third area or category of land claimed by the plaintiff is over three lots numbered as lots 1, 2

A and 3 in the map annexed to a letter of authority No. 06/93 dated 7 September 1993 issued to Pet Rocks Malaysia, a firm wholly owned by the plaintiff issued by the Forest Department, Sarawak, where he had the right to extract logs or timber from the said lots, containing an area of approximately 34 acres more
B or less shaded red in the map annexed to the statement of claim, (iv) on or about April 1993, two (2) issue documents of title had been issued out known as lot 85 and lot 86, both of block 1, Matang Land District in favour of the 4th defendant, the areas which cover and/or include these 1st, 2nd and 3rd plots of land,
C claimed by the plaintiff. The plaintiff's complaint is that his NCR over these 1st, 2nd and 3rd parcels had been impaired and that the issuance of these lots 85 and 86 to the 4th defendant, which incorporated the plaintiff's said parcels is null and void in law. (v) on or about 28 May 2000 to 4 June 2000, the 3rd defendant,
D and/or his servants or agents, representing the Scouts Movement in Sarawak, trespassed onto the said 1st, 2nd and 3rd plots of land thereby causing extensive damages to the said lands and the plaintiff's property(s) and the plaintiff claims compensation for these damages, (vi) the laws of Sarawak in particular the Sarawak
E Land Code 1958 (SLC) and its predecessors had recognized, NCR over land. As NCR lands are untitled, the right is proven by cultivation, farming and/or occupation of the land and seen in the light of the custom and *adat* of the plaintiff, (vii) secondly, it is the plaintiff's contention that alienation of state land to any
F person cannot be done unless NCR had been extinguished, surrendered or compensation had been paid to the owners of such land. In this case no extinguishment had first been made or exercised by the 1st and/or 2nd defendant over the area where lot 85 and 86 block 1 Matang Land District had been issued.

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And the plaintiff prays for the following reliefs: (i) a declaration that the plaintiff has acquired NCR over the said 1st and/or 2nd and/or 3rd plots of land, (ii) a declaration that this right precludes the 1st to 4th defendants from impairing or abridging the plaintiff's
H rights, (iii) a declaration that the areas of land under lots 85 and 86, block 1, Matang Land District issued to the 4th defendant, in as far as those areas encroaches onto the plaintiff's said plots of lands is null and void to that extent, (iv) a declaration that the 3rd defendant and/or his servants or agents, had trespassed onto
I the plaintiff's said plots of lands, (v) a prohibitory injunction restraining the 4th defendants and/or its servants or agents from

trespassing, entering, clearing, using or occupying the plaintiff's plots of land, (vi) general and exemplary damages against all the defendants to be assessed, (vii) interest to be charged on the said amount of damages at the rate of 8% per annum from the date of issuing the two titles to lots 85 and 86, block 1, Matang Land District, to date of judgment and realization as against the 1st and 2nd defendants, (viii) interest to be charged on the said amount of damages at the rate of 8% per annum from June 2000 to date of judgment and realization as against the 3rd defendant, (ix) aggravated damages, (x) any other orders or reliefs the court deems fit and just; and (xi) costs of this action.

Defence Of 1st And 2nd Defendants

[6] The 1st and 2nd defendants say: (i) they have no knowledge of the sale and purchase agreement, (ii) no permit was ever issued under s. 10 of the SLC or any other written law to any person to occupy or exercise rights and privileges over the 1st parcel of land shaded yellow in the map attached to the statement of claim, (iii) that NCR, in accordance with the Iban *Adat* can only be acquired in the manner set out in s. 5 of the SLC or such rights over land must be recognized according to laws in force prior to 1 January 1958. (iv) any alleged cultivation carried out by plaintiff in 1986 or cattle farming activities in 1991 over lot 34 (2nd parcel) were done without lawful authority of the 1st and 2nd defendants and by reason thereof the plaintiff was in unlawful occupation of state land, (v) although a letter of authority No. 06/93 was issued by the section forest officer Kuching to Pet Rocks Malaysia on 7 September 1993 to take forest produce therein from an area of about 34 acres within lot 85 (3rd parcels) the letter of authority expired on 6 February 1994. That the land alienated to Lembaga Amanah Kebajikan Darul Falah was properly issued to the Lembaga. (vi) the plaintiff's action against the 1st and 2nd defendants is statute barred by virtue of s. 202 of the SLC and/or s. 2 of the Public Authorities Protection Act and/or Item 97 of the Schedule to the Limitation Ordinance of Sarawak (LOS). That the 2nd parcel of land ie, lot 86 while it was state land ie, prior to its alienation to the said Lembaga Amanah Kebajikan Darul Falah, was part of the Sempadi Forest Reserve constituted *vide* Government Gazette Notification No. XXVII dated 10 March 1923 and continued to be a forest reserve until it ceased to be so reserved *vide* Sarawak Government Gazette Notification No.

687 on 20 March 1970. (vii) lot 86 (3rd parcel) was formerly part of Sempadi Forest Reserve and ceased to be a forest reserve on 7 August 1964 *vide* Government Gazette Notification No. Swk. L.N. 145. (viii) that a caveat has been lodged against lots 85 & 86 block 1 Matang Land District by the plaintiff on 8 July 1996 at the Kuching Land Registry Office *vide* Instrument No. L.12580/1996.

Defence Of The 3rd Defendant

[7] The plaintiff's claim against the 3rd defendant is for trespass. The 3rd defendant says that they have lawfully entered into the said land after having obtained consent from the 4th defendant who is the registered proprietor.

Defence Of The 4th Defendant

[8] The 4th defendant says that the plaintiff's claim in respect of the 1st, 2nd and 3rd plots of the land is unsustainable in consequence of the doctrine of indefeasibility of title. Further, the 4th defendant alleges that as title has been lawfully issued to the 4th defendant it conclusively establishes that the plaintiff never had customary rights or if such rights existed, it was extinguished upon issuance of title.

The Law

[9] The law on NCR has been well articulated in a concise manner by Justice Datuk Clement Skinner sitting in the Court of Appeal in the case of *Madeli Salleh v. Superintendent of Lands & Surveys & Anor* [2005] 3 CLJ 697. The decision of the Court of Appeal in *Madeli Salleh*'s case *(supra)* was affirmed by the Federal Court (see *Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509).

[10] It is common knowledge that NCR was recognized for generations in Sarawak and continues to be respected in a restrictive sense by various legislation but without destroying the legitimate expectation of native *per se* taking into consideration the principles of sovereignty and the need for development in this time and era (see Native Customary Laws And Native Rights over Land in Sarawak – prepared by the State Attorney-General's Chambers, Sarawak for Human Rights Commission in 2004).

State Attorney-General's Chambers Arguments

[11] The position the State Attorney-General's Chambers has taken can be summarised as follows:

(a) NCR to land is also a system which recognises the rights of the native community to occupy and use land which by law belongs in the old days to the Crown, but nowadays by reason of s. 12 of the SLC, belongs to the State, (b) the system of NCR over land had evolved over near one and half centuries; since 1841, when the Rajah James Brooke decided to make his first pronouncement pertaining to land. Through this process of evolution, native rights to land were recognised, under certain conditions spelt out in the various Proclamations and Orders made by the Rajahs and subsequently, in various legislations passed by the Council Negeri (now Dewan Undangan Negeri of Sarawak), (c) as such, land occupied by natives under native customary tenure, are untitled ie, there is no document of title to show ownership. Whether a native has rights to such land would depend on whether he or his forefathers fulfilled certain requirements under the laws prevailing at the time which rights to the land were said to have been created, (d) native customs which could create rights over land had been modified in Sarawak by laws made by the Rajahs and subsequently by the Council Negeri. At this juncture, it ought to be pointed out that in all legal systems, indigenous rights may be modified or extinguished by legislative or executive action. Professor Douglas Sanders in his paper on "Indigenous And Tribal Peoples: The Right, To Live On Their Own Land" (presented at the 12th Commonwealth, Law Conference held in Kuala Lumpur in September, 1999) stated: "A leading Australian constitutional text summarises the basic rule from the Mabo decision as follows: The indigenous population had a pre-existing system of law, which along with the rights subsisting thereunder, would remain in force under the new sovereign except where specifically modified or extinguished by legislative or executive action." (e) it is pertinent to observe there is a significant difference between native customs *(Adat)* and NCL. AJN Richards (a former resident and acknowledged authority on this subject) in his book *Land Law And Adat* at p. 9, stated: "As was pointed out by Mooney, as Crown Counsel

A and Hickling, the law does not, in fact, gives effect to any customs whatsoever except the codified law of derelicts ...". The SLC and its predecessor define "customary law" to mean "a custom or body of customs to which the law of Sarawak gives effect". The natives of Sarawak may have and in fact do
B have many customs, but for these customs to have effect as "customary laws", they must have the sanction of the Law. This is what characterised the difference between native customs and the customary laws; and this differentiation is acknowledged by the definition of "*Adat* in the Majlis Adat
C Istiadat Sarawak Ordinance, Ord. No. 5 of 1977 where "*Adat*" is defined as "native custom or body of native customs to which lawful effect has not been given thereto", (f) thus, in relation to land, the practice of native custom does not necessarily give rise to rights over land. It is only the practice
D of those customs which are part of the customary law of Sarawak, which can create rights to land and this is evident by the provisions of s. 5(1) of the SLC which provides, *inter alia*, that NCR over land may be created "in accordance with native customary law". "NCR" to land, however, received its
E first statutory definition in the Land Settlement Ordinance (also known as Rajah Order L–7 of 1933), enacted on 22 June 1933. It is defined by s. 66 of that Ordinance as follows: "Native customary rights shall be recognised in respect of – (a) land planted with fruit trees, when the number of fruit trees
F amounts to twenty and upwards to each acre; (b) land that is in continuous occupation or has been, cultivated or built on within three years; (c) burial grounds or shrines; (d) usual rights of way for men and animals from rivers, roads, or houses to any or all of the above." (g) however, the
G government has always respected the *Adat* of the natives in Sarawak and established the Majlis Adat Istiadat to codify the *Adats* of the various communities and established a native courts system to see that native customs are enforced. So far the following *Adats* have been codified, (i) Adat Iban Order,
H 1993 (Swk. L.N. 18/93); (ii) Adat Bidayuh Order, 1994 (Swk. LA 27/94); and (iii) Adat Kayan-Kenyah Order, 1994 (Swk. L.N. 28/94). Those *Adats* which have been codified would constitute the NCL of the state. The uncodified customs and traditions can be practised by the native communities but they
I do not form part of the NCL of the state.

[12] The learned writer Dimbab Ngidang in his article "Transformation of Iban Land Use System In Post Independence Sarawak" published in Borneo Research Bulletin Vol. 34 says that Iban land use, their customary land tenure, and inheritance patterns have all undergone many changes in post-independence Sarawak. The article looks into the historical, sociological and cultural justifications of Iban customary land tenure and its legal constraints under the SLC.

I have taken the liberty to reproduce the relevant parts of the article which was useful for me in writing this judgment which reads as follows:

> Land Use Under Customary Law,
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> A close relationship between land, farming practices, and resource use among the Iban reveal important features of the community's agrarian roots. The traditional Iban farming system comprised, a rich mixture of religious rites and cultural practices (Sather 1980, 1990 and Freeman 1955), and formed the basis upon which the pioneering ancestors of the present-day Iban first created customary rights to land in Sarawak.
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> Creation of customary rights to land and other natural resources within the territory of a longhouse community began when a ritual ceremony called panggul menoa was carried out by the pioneering ancestors in a particular area (Lembat 1994). Once this ritual has been performed, pioneering households known as bilik families would then clear plots of virgin jungle to establish individual parcels of farmland called tanah umai. These pioneering individuals who first cleared and cultivated the land thereby created rights to the land which were then passed on to their descendants through succeeding generations of bilik family members.
>
> Individual plots of farmland are separated from one another by boundaries called antara umai in Iban. Traditionally, antara umai were demarcated by streams, rivers, watersheds, ridges, and other permanent landmarks used as natural boundaries between individual parcels of farmland. Such boundaries defined the size and extent of individual bilik rights over farmland. Rights of ownership are transferable in this system from parents to children. Distribution of plots of farmland among children is not necessarily equal. It is common among the Iban to accord more cultivation rights and privileges to children who look after ageing parents than to those who do not.

A territory or area of land which belongs to a longhouse community within defined boundaries is called its pemakai menoa in Iban (Lembat 1994). Each pioneering longhouse, has its own territorial domain. A longhouse is separated from others by a garis menoa (village boundary). The garis menoa is a very, important mechanism for resource distribution among pioneering longhouse communities. It also functions as an important resource management strategy because it helps to define areas of constrained space and so reduces inter-community conflicts between pioneering longhouses. At the same time, it also regulates access to natural resources and cultivation rights among the members of the same longhouse within a pemakai menoa.

The pemakai menoa, both physically and as a concept, is central to Iban resource management. It is the hub of Iban resource tenure and, in a physical sense, constitutes a collective pool of natural resources, such as native farmland, fruit orchards or groves, primary and secondary forests and forest products (ie, timber and wild vegetables, edible ferns and palm shoots, rattan, herbs and/or medicinal plants, fruit trees and bamboo); river and streams that run through a territory, and water catchments (Ngidang 2000, Lembat 1994, Richards 1961). Thus, pemakai menoa is the territorial domain of a longhouse community where customary rights to land and other natural resources were acquired by pioneering ancestors (Ngidang 2000).

Rights to a piece of land can be lost either by a transfer or when a person moves to another village through migration or pindah. Section 73 of Adat Iban on pindah states that whoever moves from the longhouse to another "shall be deprived of all rights to untitled land or any customary land that has not been planted with crops and all such land shall be owned in common by the people of the longhouse." (Majlis Adat Istiadat 1993: 31). If an individual or family migrates to another village from the longhouse (pindah), such rights can also be transferred to a relative who will in turn provide him with tungkus asi. The term tungkus asi describes a token gift provided by the recipient or as a form of compensation, "ganti tebi kapak, tebi beliong, a replacement of effort and the chipped axe blade, the rice eaten during clearing" (Richards 1961:42). Today, tungkus asi has been replaced a token monetary gift known as ganti rugi.

Thus tanah umai, or farmland, can be either private or common property, or both, depending on whether rights of access are held by individuals or by the community. A resource sharing concept is applied here when cultivation rights and rights of access to land are vested in the community. A community may invoke free

access only to certain types of natural resources such as wild vegetables, shoots, etc. when taken for personal use. At the same time, it reserves the right to restrict access to resources which have a high economic value, such as rattan, timber, and fruit trees, the benefits of which are shared by the whole community.

It is customary to leave harvested farmlands fallow. Forest-fallowing as practiced by the Iban is divided into four main stages (Freeman 1955). The first stage of fallow is called jerami. The term jerami or redas (in the Batang Rajang area) refers to bush-fallow land at 1-2 years after a padi crop has been harvested. The next stage is temuda, which has a fallow period of 3-10 years, then damun with a fallow period ranging between 10-20 years. Finally, resembling virgin forest, pengerang is temuda which has been left uncultivated for more than 25 years.

Rights to cultivate temuda land initially belong to, and then are inherited from, the person who first felled the virgin forest. In the past, when resources were still abundant, any member of a longhouse had free access to resources in a temuda. For instance, he could take firewood and bamboo; gather wild fruits and vegetables, etc. without consulting the bilik family having cultivation rights over the land.

In addition, a longhouse community has its own forest reserve or pulau. The term pulau refers to an area of primary forest within a pemakai menoa. Pulau can be collectively owned under a common property regime and managed by a longhouse community, or individually owned. An individual creates the latter adjacent to the cultivated plot of land he first cleared at the time when a longhouse community established pemakai menoa. This reserve is called pulau umai and acts to preserve certain natural resources for future use. These resources can be rattan, tapang trees, fruit trees, timber and so on. Rights of access to these resources belong to those who first cleared the land and to their descendants thereafter. In the case of community-owned pulau, there are four types of communal forest reserves set aside for hunting, gathering building materials and water catchments within a pemakai menoa.

During the process of creating a pemakai menoa in the pioneeringdays in the past, individuals might claim rights to a variety of special trees such as teras or belian, engkerebai (the fruits of which are used to produce textile dyes), engkabang, and tapang trees (the latter providing a place for honey bees to build hives). Tree tenure is established when the first person who finds the trees clears the undergrowth around them and thereby claims

rights to these trees. Such rights were, and continue to be, heritable and passed down to the descendants of the claimant (cf. Sather 1990). The same applies to a planted tree; tenure rights apply to the tree and to the harvest of its fruits. Once an individual has tenure rights over certain trees, whether planted or found, the planter's or finder's descendants have the right, to demand compensation if these trees are burned or felled by someone else.

Historical Justification of Customary Land Tenure

According to the Sarawak Land Code (SLC: Part II, page 27), customary rights to land could only be created prior to 1 January 1958 in accordance with the native customary law of the community, based on any of the methods specified in Section 2, if a permit were obtained under section 10. In Section 5(2) of the-Sarawak Land Code, these rights may be created by (a) felling of virgin jungle and the occupation of the land; (b) the planting of land with fruit trees; (c) the occupation or cultivation of land; (d) the use of land for a burial ground or shrine; (e) the use of land of any class for rights of way; or (f) any other lawful methods. However, historical evidence suggests that the above land law clearly reflected legislative efforts to deconstruct native rights and reconstruct them based on foreign laws, which were alien to the Iban community.

Sarawak, with two-thirds of its population indigenous Dayaks, had a long history of Brunei rule prior to Brooke and colonial rule, and traditional land tenure, based on customary law or adat was in existence even before the Dayaks came under Brunei influence. Brooke land administration gave due recognition to the intimate relationship between adat and traditional land tenure.

Customary law or adat has always been instrumental in maintaining order and providing a state of balance between individuals, between individuals and the community, and between the community and the environment, both physical and spritual (Langub 1999). Today, adat is still widely practiced among the Dayaks of Sarawak. It is under the custodianship of the village headman and a crucial aspect of adat (Richards 1961; Porter, 1967) is the definition of rules of access and rights of ownership to land and other natural resources within a longhouse territorial domain. Adat dictates the rules of inheritance and/or transferability of land from the pioneering ancestors to the present generation and is used by every longhouse community to regulate social relations and farming and other economic activities (Langub 1999). It is also a collective community framework for regulating resource utilization and management in a sustainable manner for the common good.

> In 1842 James Brooke cautiously introduced the Code of Laws, which was principally characterized by respect for people's customs and traditions. James said that:
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> I am going on slowly and surely, basing everything on their own laws, consulting all their headmen at every step, reducing their laws to writing what I think right, merely in the course of conversation - separating the abuses from the customs... I follow, in preference, the plan of doing justice to the best of my ability in each particular case, adhering as nearly as possible, to the native law or customs. (Quoted by Porter 1967:27.)

Recognition of native customary law led James Brooke to provide an important provision in the Land Regulation of 1863, in which he declared that no scheme of alienation or land development should ever be introduced except in respect to land over which no rights had been established. The Code of Laws of 1842 permitted Chinese immigrants to settle only on lands not occupied by Malays or Dayaks. A paternalistic relationship between the White Rajah and the natives encouraged subservience to Brooke rule.

When James Brooke was installed the first Rajah, of Sarawak in 1841, he deliberately created a dualistic political economy: commercial agriculture and mining for the Chinese immigrants, on the one hand, and a subsistence economy for the natives, on the other. Nevertheless, the Brookes did not encourage the development of large plantations in Sarawak. From 1841 to 1941, "Sarawak was run as a virtual, personal kingdom by, in turn, James, Charles and Vyner Brooke," in which "government was an amalgam of autocracy and paternalism" (Cleary and Eaton 1996-7). Economic dualism reflected the Brookes' policy of non-interference in the native way of life. By invoicing such policy, the Brooke administration also intentionally created legal pluralism (Hooker 1999) which defined and categorized two types of land tenure. One was based on native customary law or adat perpetuated among the natives. The other was a codified land system, which legalized private land ownership and supported the commercialization of agriculture.

Can NCR Be Transferred?

[13] This matter was initially fixed for decision on 24 April 2008. I found that the submission was inadequate as the core issue to this case as to whether NCR can be transferred was not adequately answered. In consequence, I gave directions to particularly address the following questions:

(i) What is the customary practice to transfer land? (ii) What must be stipulated in the transfer agreement? (iii) How does the area of occupation identified? (iv) Who must be the witness(s) to the transfer ie, must it be the penghulu, etc.? (v) What must be the traditional consideration; must it be stipulated in the agreement? (vi) Is Iban a race? What does community mean in s. 5? (vii) Can transfers be made only to community members ie, within them and their relation? (viii) Who has the legal burden of establishing the customary rights? (xi) What is the effect of the 1958 Act on transfers? (x) What is the scope and jurisdiction of native courts related to this claim, ie, must a claim first be initiated and determined by native court or any other tribunal under the law other then the court? (xi) Whether native rights can be sold by sales and purchase agreements?

[14] The 1st and 2nd defendants have advanced a comprehensive submission on these issues. The 1st and 2nd defendants say:

(a) *Preliminary as to transfer*

(i) firstly, with regard to the said points, we assert the concept of "occupation by a native of land is to sustain his native rights thereto, so as to occupy the same as licensee of the government" (see s. 5(2) of SLC). This is in line with the principle stipulated in s. 12 of the SLC that all land belongs to the government, (ii) this concept of a native having lawfully acquired NCR over land occupying the same as licensee of the government, necessarily implies that rights to land, created or acquired through native custom is based on occupation. Such occupation must be continuous meaning that a native who occupies land based on native customary tenure cannot part with possession thereof. This is consistent with the *Adat* that if a Dayak leaves his land and moves to another area in a different river system, he loses his rights to the land. The Native Court of Appeal, presided by Lascelles J. sitting with Hermanus Assan, Temenggong Jugah and Pengarah Banyang, held in *Sumbang anak Sekam vs Engkarong anak Ajah* [1958] SCR 95, held that: "Individual customary rights are not transferable by sale or otherwise for value." (See also: *Sat ak Akum & Anor vs Randong ak Charareng* [1958] SCR 104). That case, which concerns

Dayak customs, decided by a court comprising distinguished leaders of the Iban community, reflects the customary law concerning the transfer of land held by individuals through native customary tenure. The Native Court of Appeal is the highest Court in the Native Court System in Sarawak, (iii) based on the above principles and customs of the Dayaks and the *Sumbang's* case (*supra*), land held by a Dayak individual under NCR cannot be transferred. In this instant case, the plaintiff has not adduced any evidence of any customary practice that enables a native holding land under NCR to "transfer" his land or rights thereunder to a third party. (iv) however, there are regulations and administrative procedures laid down by the government pertaining to "disposal" of NCR land. These are found in Secretariat Circular No. 12/1939 ("the said Circular"). In para. 1 of the said Circular it is stated *inter alia* as follows: "It is the aim of the government to record and protect these customary rights and to prevent the various communities from impoverishing themselves by disposing off their rights to other, whether alien or natives." (v) it is evident that in 1939, before the Japanese occupation, the then government's aim or policy was to discourage native communities from disposing off their rights to land to others whether alien or natives. (vi) this philosophy is further emphasized in paras. 3(2), (3) and (4) of the said Circular. Para. 9 of the Circular deals with the appointment of a village council whose duties include, *inter alia*,: "to approve or disallow or prevents voluntary dealing in land by members of the community subject to the usual right to appeal", (vii) in other words, since the issuance of the Circular, which must have applied to rights established either before or after the issuance of the Circular, was that transfer of land held under native customary tenure must be approved by the village council. Whatever customs that may have existed (which is not admitted) pertaining to transfer of NCR land, that custom is subject to or have been modified by the terms of the Secretariat Circular which the parties have disputed especially as the plaintiff had included it in his bundle of authorities, (viii) the Circular, however, did not prescribe any instrument of transfer, but it must be assumed that the Village Council would, when giving approval to any voluntary dealing in

land by members of a native community, require some form of documentary evidence in support of the dealing, (ix) land held under NCR where the native occupies the same as licensee of the government cannot be sold by sale and purchase agreement because: (a) in so far as it relates to Iban custom, this is not one of the modes prescribed in the Tusun Tunggu for an Iban to acquire rights over land, (b) the Tusun Tunggu has explicitly stated that apart from felling a virgin jungle and planting of crops thereon so as to create *temuda*, the only other way in which an Iban may acquire rights to land is by gift or inheritance, (x) by letter ref: BB/CIV/LIT/476/00 dated 25 April 2008, plaintiff's advocate submitted that under the Land Code Amendment Ordinance 2000, NCR may be transferred. Firstly, as appears from Swk. L.N. 17/2002, the relevant provisions of that Ordinance relating to transfer etc, of NCR land have yet to come into force. In any event, transfer should be in accordance with the system of personal law applicable to the community to which the native belongs and shall be regulated by rules made under s. 213 of the SLC. The purported "transfer" of NCR land to the plaintiff was carried out in accordance with the provisions of the said Ordinance (which were not enforced) and the customary law of the community to which the plaintiff belongs does not permit transfer of an individual's native rights over land.

(b) *How is the area of occupation being identified?*

(i) that apart from actual survey and demarcation of boundaries, through professional or scientific survey of the perimeters of land occupied by natives under customary tenure or as licensee of the government, would have to be undertaken as required by para. 13 of the Secretariat Circular No. 12 of 1939. In the event of boundary disputes, these disputes to be settled in accordance with para. 16 of the said Circular, (ii) survey of NCR to settle disputes is illustrated in the case of *Keleman ak Asa vs Imang ak Tawi*.

(c) *Who must be a witness to the transfer?*

(i) since approval or disapproval for dealings over land held under NCR, had to come from the village council, the witness to any transfer or dealings on such untitled land must be the village council or a person authorized by the village council to witness the same, (ii) in this case, the sale and purchase agreements produced by the plaintiff as evidence of his acquisition of the land under NCR, were witnessed by an advocate. There is no evidence produced nor any legal authority cited that an advocate should be a competent witness to the "transfer" or "disposal" of NCR land by the vendors to the plaintiff.

(d) *What must be the traditional consideration?*

(i) what may be traditional consideration for transfer of NCR was best spelt out in the judgment of the Court of Appeal in *Sat ak Akum & Anor (supra)* which ruled:

> They certainly cannot be transferred for value. If the "owner" leaves the district the land reverts to the longhouse for communal use under the authority of the Tuai Rumah who can allocate the land to anyone in the house who he considers most needs the land. This of course only applies if there are no heirs remaining in the district. If such do remain then they take over the use of the land. If ever the "owner" returns to the district he can resume the use of the land. The "owner" leaving the district without any heirs to take over the land may arrange for someone else to have the prior right to farm that land by taking from him what is called "tungkus asi", which is some form of token to bind the agreement. It may not be anything of value, which would invalidate the transaction, but may consist of as much as a pig. The rights taken over by the person paying the "tungkus asi" are inheritable by the heirs of that person but revert to the original owner if he returns, or to his heirs if they return.
>
> It appears to me that there is in effect a form of entail on temuda land and as long as there are heirs entitled to exercise the farming rights over that land a testator cannot by will, or indeed by any other form of disposition, transfer those rights to anyone else. This seems to me to be only right when one considers the communal nature of Dayak farming and the part played by the family unit of the bilek or door.

(ii) this decision was followed by William J in *Galau & Ors v. Penghulu Imang & Ors* [1966] 1 LNS 50; [1967] 1 MLJ 192:

In the case of *Sat anak Akum & Anor v. Randong anak Charareng*, a decision of the Court of Appeal, Lascelles J., a man much versed in Iban law and custom, had this to say:-

> The next question to consider is that of 'temuda' land. To put it as simple as possible these 'temuda' rights are rights to farm over Crown Land and are a form of customary tenure; the holders are mere licensees of the Crown, but it has been my experience that this is difficult to explain to Dayaks in general and they regard it as land owned by them. Temuda rights are created only for the use of the original worker, his heirs and descendants. They certainly cannot be transferred for value. If the 'owner' leaves the district the land reverts to the longhouse for communal use under the authority of the Tuai Rumah who can allocate the land to anyone in the house who he considers most needs the land. This of course only applies if there are no heirs remaining in the district. If such do remain then they take over the use of the land. If ever the 'owner' returns to the district he can resume the use of the land. The 'owner' leaving the district without any heirs to take over the land may arrange for someone else to have the prior right to farm that land by taking from him what is called 'tungkus asi', which is some form of token to bind the agreement. It may not be anything of value, which would invalidate the transaction, but may consist of as much as a pig. The rights taken over by the person paying the 'tungkus asi' are inheritable by the heirs of that person but revert to the original owner if he returns, or to his heirs if they return.

(iii) a further important case is that of *T.R. Bujang anak Guntor v. T.R. Tanjong anak Usat*. It is important in that in this instance it was recognized that longhouse communities can agree to boundary lines which will prevent members from acquiring '*temuda*' rights in each other's area, (iv) based on this judgment, if there had to be a transfer of NCR, in the circumstances spelt out in the judgment, the traditional consideration would be *"tungkus asi"* or "may consist of as much as a pig".

(e) *Would failure to obtain a permit be only a mere irregularity?*

(i) to create NCR, after the passing of the Land (Classification) Ordinance 1948 (as amended in 1955) and under s. 5(1) of the SLC (effective from 1 January 1958) a permit is required. See: s. 10(3) of SLC. Without such a permit, an offence under s. 10(3) is committed and the offender would be subject to a fine and/or imprisonment, (ii) further, r. 19(1) of the Land Rules, says as follows:

> Every application by a non-native for a permit to acquire rights in Native Area Land or Native Customary Land shall be made to the District Officer of the district in which the land is situate and shall not be granted unless:
>
> (a) the District Officer is satisfied that the rights are of a nature recognized by the native system of personal law of the native community concerned; and
>
> (b) that the grant of a permit does not contravene any general or special directions of the Minister as to the issue of such permits.

(iii) accordingly, the failure to fulfill the requirement of a permit is not a mere irregularity. It is a mandatory requirement. The non-compliance therewith is a penal offence.

(f) *Can the transfer (of NCR land) be done within the community and relatives or also to third parties?*

(i) based on the Native Court of Appeal's decision in *Sumbang's* case *(supra)* and *Sat ak Akum (supra)* there can be no transfer by individual Dayak of his NCR land. However, the land may be "transferred" by gift or inheritance to a relative or descendants in the limited circumstances mentioned by the Court of Appeal in *Sat ak Akum's* case *(supra)*.

(g) *Who has the legal burden of establishing NCR?*

(i) based on s. 5(7) of the SLC, the legal burden to establish NCR lies with the plaintiff who pleaded that he has NCR over the land claimed by him herein. This principle is consistent with the provisions of s. 101 of the Evidence Act 1956 (Act 56) which reads:

A (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

B

(h) *What is the effect on transfer after 1958?*

(i) the law on how NCR may be acquired after 1 January 1958 is now clearly spelt out in ss. 5(1) and (2) of the SLC. (ii) a purported transfer of "ownership" of NCR or NCR land is not stipulated mode of acquisition of NCR. As such, a purported transfer of NCR land or rights thereto, does not confer on the intended, "transferee" rights to the land purported to be transferred.

D (i) *What is the scope and jurisdiction of the Native Court in relation to this case?*

In *Ongkong Anak Salleh v. David Panggau Sandin & Anor* [1982] 1 LNS 92; [1983] 1 MLJ 419, Seah J, (as he then was) described the jurisdiction of the Native Court System in Sarawak (which is purely a creature of state law ie, Native Court Ordinance) is as follows:

> The jurisdiction of the Native Courts is limited to trying cases rising from breaches of native law or custom in which all the parties are subject to the same native system of personal law relating to religious, matrimonial or sexual matters including land disputes where no land title has been issued by the Land Office and where the value of the subject matter does not exceed fifty dollars (see section 5). And section 7(4) provides *inter alia*, that every court exercising powers of appeal or revision under this Ordinance shall decide all matters according to substantial justice without undue regard to technicalities.

(ii) although the above case was decided under the repealed Native Courts Ordinance, the present Native Courts Ordinance, 1992, have provisions which are similar to the sections referred to in the above case. The civil jurisdiction of the High Court conferred by s. 23(1)(d) of the Courts of Judicature Act 1964 (CJA 1964) provides:

23 (1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have the jurisdiction to try all civil proceedings where

(a) ...}

(b) ...} not relevant

(c) ...}

(d) any land the ownership of which is disputed is situated

(iii) "any land" must include also land without title and be held under NCL. (iv) the CJA 1964 is a federal law and by virtue of art. 75 of the Federal Constitution, state law like the Native Court Ordinance cannot be inconsistent with the federal law. Hence, "any land" in s. 23(1)(d) should not be construed to exclude the civil courts jurisdiction over land which is untitled and held under native customary tenure. In the circumstances, the High Court has jurisdiction to deal with dispute as to ownership of land; in this case whether the land belongs to the plaintiff or to the 4th defendant. The jurisdiction conferred on the High Court by s. 23(1)(d) of the CJA 1964 is not excluded by s. 5(3) (a) of the Native Court Ordinance.

[15] I have heard the evidence, witnesses' statements, all documents and submissions of the parties in detail. I take the view that the plaintiff's claim must be dismissed. My reasons are as follows:

(i) I find merits in the submission of the 1st and 2nd defendants that NCR cannot be transferred by ordinary sale and purchase agreement. It is beyond doubt that NCR of Sarawak is well recognized by the apex court. In the Federal Court case of *Superintendent of Land & Surveys Miri Division & Anor (supra)*, Arifin Zakaria FCJ held:

(1) The proposition of law as enunciated in the two cases of *Adong Kuwau (supra)* and *Nor Anak Nyawai (supra)* reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in the Australian case of *Mabo (No. 2)* that by the common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire beneficial ownership of the land. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy

Council in *Amodu Tijani v. Secretary, Southern Nigeria*, where the Privy Council in an appeal from the Supreme Court of Nigeria held that radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes. Although the instant case dealt with individual rights and not communal rights, the principle applicable was the same. *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (foll); *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* (foll); *Mabo (No. 2)* (foll); *Amodu Tijani v. Secretary, Southern Nigeria* (foll), (paras 22 & 23)

(2) Native holdings are not only recognized by the 1920 Regulations, but where possible, such holdings may even be registered. Registration, however, is not a necessary prerequisite for such holdings to be recognized. In the light of this, it was erroneous to hold, as was held by the learned Judicial Commissioner in the present case, that native customary rights in Sarawak were only created by s. 66 of the Ordinance. What s. 66 purported to do was to stipulate new conditions before native customary rights could be recognized after the coming into force of the Ordinance. It does not purport to nullify native customary rights that had been acquired or recognized prior to the coming into force of the Ordinance. In other words, it has no retrospective force. The respondent's claim in this case arose from circumstances which occurred prior to the Ordinance, since his father and his forefather had been in occupation of the said land prior to 1922. It was not in dispute that the respondent was born on the said land in 1922. Even though the respondent admitted that he left the said land before the house on the said land was gutted by fire in 1941, he maintained that he returned to the said land regularly to attend to the fruit trees. He claimed he did so on a monthly basis. The respondent's testimony in this regard went unchallenged. This was further fortified by the evidence of an employee of the Jabatan Kerja Raya who visited the said land as late as 1975 and confirmed that there were fruit trees and rubber trees on the said land. A letter dated 26 March 1982 addressed to the 1st appellant from the Head of the Malay Community in Miri in support of the respondent's application for title to the said land confirmed that the respondent's father was in occupation of the said land before it came under the Shell Concession Area.

(ii) *Madeli (supra)* was a case which was dealing with a native Malay who claimed NCR on the grounds that many years prior to 1 January 1958, his father and later himself, had acquired and exercised NCR over the disputed land by clearing the land, occupying the land and planting rubber and fruit trees on the land. In this case, the plaintiff is not alleging that his ancestors were in continuous occupation of the land. On the contrary he says that he has purchased the NCR by way of ordinary sale and purchase agreement. I do not think NCR can be transferred by modern conveyancing instrument of transfer as it could not have been *prima facie* part of the NCR and/or practice. I agree with the submissions of the 1st and 2nd defendants that NCR in Sarawak can only be transferred in a limited sense for example by gift or inheritance etc, within the community members of the native before any claimant can be showered with the exclusive privileges. That is to say, *inter alia*, a native from a community residing in south of Sarawak cannot purchase NCR from a native in a community residing in north of Sarawak. The nexus must be within the community and not within the race. For courts to recognise any such transfers it must be legislated. It is not sufficient for the plaintiff to allege such transfers are in vogue and is recognized in practice, without satisfactory evidence adduced in court. The burden of proof lies with the plaintiff and that burden has not been discharged in this case according to law.

(iii) It is also my finding that the plaintiff has not acquired NCR pursuant to the SLC and in this context I agree with the submission of the defendants on this issue.

(iv) Further, NCR by its nature is not a right *in rem* and the law requires strict adherence to NCR and the transfer must take place according to strict compliance of customary formalities and cannot be otherwise as done in this case.

[16] For reasons stated above, I dismiss the plaintiff's claim with no order as to costs. I hereby order so.